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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

COUNTY OF NAPA,

Plaintiff, Cross-defendant and  
Respondent,

v.

DAVID D. WESNER et al.,

Defendants, Cross-complainants  
and Appellants.

A154839

(Napa County  
Super. Ct. No. 26-59313)

David D. Wesner, Janice L. Wesner, and Don Wesner, Inc. (collectively the Wesners) appeal from entry of final judgment in this contract action filed by the County of Napa (County). In the underlying action, the County sought to set aside a settlement agreement reached by the parties in an earlier federal action regarding an alleged public and private nuisance on the Wesners' land. The trial court found in favor of the County on its causes of action for declaratory relief, against the County on causes of action for nuisance, and reserved jurisdiction to determine rescissory damages for the Wesners. After purportedly entering a "judgment," the court awarded the County attorney fees and costs as the prevailing party, and then later awarded the Wesners rescissory damages for the costs of moving their equipment and vehicles from the area.

In two prior appeals, we determined the trial court had yet to enter final judgment in this case. Because the court never reduced the award of rescissory damages to a judgment, we dismissed the prior appeals and urged the trial court to enter a "final

judgment” as soon as reasonably possible. Following remand in the second appeal, the trial court entered a final judgment, incorporating both its order awarding the County attorney fees and its order granting the Wesners rescissory damages. The Wesners timely appeal from that final judgment, and from the trial court’s order denying a motion for new trial and motion to vacate the judgment.

The Wesners now claim the attorney fee award in favor of the County must be reversed because it was “premature,” incorrect as a matter of law, and an abuse of discretion by the trial court. We conclude the trial court’s determination that the County was the “prevailing party” under Civil Code section 1717 prior to final resolution of the parties’ contract claims was error, and accordingly reverse that portion of the judgment awarding attorney fees to the County.

## **I. BACKGROUND**

We incorporate by reference background facts from the second appeal in this matter, *County of Napa v. Wesner* (Mar. 17, 2017, A146886) [nonpub. opn.] (*Napa v. Wesner*).

In 2009, the Wesners and the County entered a settlement agreement to resolve a federal lawsuit related to an alleged nuisance on the Wesners’ property. The settlement allowed the Wesners to use a portion of a road adjacent to their property—the Conn Creek Road—that the County believed was abandoned.

In 2012, the County filed suit in Napa County Superior Court to set aside the settlement with the Wesners based on mutual mistake after the County discovered the road was not abandoned. The County asserted causes of action for declaratory relief (invalidity of contract and encroachment), public and private nuisance, and breach of contract. The Wesners cross-complained against the County, asserting claims for quiet title, reformation, and partial cancellation of the contract.

In November 2013, the trial court entered a “judgment” in favor of the County on its claims for declaratory relief and rescinded the 2009 settlement agreement. The “judgment” also found in favor of the County on all three causes of action in the Wesners’ cross-complaint, found in favor of the Wesners on the County’s public and

private nuisance claims, declared the County's breach of contract cause of action "moot," reserved jurisdiction to determine the issue of restitution, and provided for recovery of attorney fees and costs upon filing of a motion or memorandum of costs.

Shortly thereafter, the County filed its memorandum of costs. In January 2014, the trial court awarded the County \$128,965.37 in attorney fees and costs as the "prevailing party" under Civil Code section 1717, because the County prevailed on its "contract-oriented causes of action" and the Wesners' cross-complaint, which was also "an action 'on the contract.'" In its order, the court explained the fact that "the action resulted in the rescission of the contract upon which plaintiff bases its claim for fees does not matter. Plaintiff may still recover fees based on the rescinded contract." The court also rejected the Wesners' argument that fees were not permitted because the contract was illegal, noting "the contract was rescinded based on mistake of fact, not illegality."

As relevant to this appeal, the court's order further stated: "Defendants argue that, even if plaintiff is the prevailing party, the court should allocate fees and costs on an equitable basis between the parties pursuant to Civil Code section 1692. . . . However, the parties agreed in open court (and the court concurred) that defendants could seek to recover the costs they incurred in relocating their equipment and vehicles, and that they could do so by way of a noticed motion. The court will not allocate fees pursuant to Civil Code section 1692, but it will entertain a defense motion to allocate the aforementioned moving costs if such a motion is filed."

Shortly after the trial court's attorney fee order, the Wesners appealed from the November 2013 "judgment" (first appeal). We dismissed that appeal because the trial court had retained jurisdiction to award restitution and thus the judgment was not final.

A few months later, in May 2014, the trial court issued an order granting the Wesners' motion for restitution/rescissionary damages. The court awarded the Wesners rescissionary damages in the amount of \$20,030.

In September 2014, the County filed a second notice of entry of judgment, after which it attempted to collect from the Wesners. The Wesners appealed from various orders issued by the trial court in 2015 (second appeal). We dismissed that appeal as to

two orders, concluding no final judgment had been issued because the order on rescissionary damages was never reduced to a judgment and we were unable to read the November 2013 nonfinal judgment, January 2014 order on fees and costs, and May 2014 order on rescissionary damages together to constitute a single final judgment.<sup>1</sup> We urged the trial court to enter a final judgment as soon as reasonably possible. (*Napa v. Wesner*, *supra*, A146886.)

In January 2018, the trial court entered final judgment in this matter. The judgment ordered attorney fees and costs of \$128,965.37 in favor of the County, and restitution to the Wesners in the amount of \$20,030. The judgment also ordered the restitution amount be offset from the attorney fees, resulting in a net recovery for the County of \$108,935.37. The trial court denied a subsequent motion for new trial and motion to vacate the judgment filed by the Wesners, after which they timely appealed.

## **II. DISCUSSION**

The Wesners contend the trial court erred in awarding attorney fees to the County because the fee motion was prematurely entered before final judgment and because the trial court determined the prevailing party and awarded fees before final disposition of the parties' claims, including the award of rescissionary damages to the Wesners. Alternatively, the Wesners contend the award must be reversed because the underlying contract was illegal and the trial court abused its discretion in finding the County was the prevailing party under Civil Code section 1717. We conclude that because the trial court awarded attorney fees before final resolution of the contract claims, its award must be reversed.

First, we do not agree with the Wesners that an award of attorney fees may only be entered after final judgment as a matter of law. Indeed, Civil Code section 1717, subdivision (b)(1) provides, in relevant part, that the court "shall determine who is the

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<sup>1</sup> As to the Wesners' appeal from trial court orders compelling David Wesner to participate in a debtor's examination, we construed the appeal as a petition for writ of mandate and granted the petition, directing the trial court to enter a new order denying the motion to compel. (*Napa v. Wesner*, *supra*, A146886.)

party prevailing on the contract . . . whether or not the suit proceeds to final judgment.” (See *Nasser v. Superior Court* (1984) 156 Cal.App.3d 52, 57–58 [noting Legislature amended Civ. Code, § 1717 to eliminate requirement that prevailing party be recipient of favorable final judgment].)<sup>2</sup>

Nonetheless, we conclude the trial court’s award of attorney fees was premature in this case because the court determined the County was the prevailing party before final disposition of the parties’ contract claims. In *Hsu v. Abbata* (1995) 9 Cal.4th 863 (*Hsu*), our high court held that “in deciding whether there is a ‘party prevailing on the contract,’ the trial court is to *compare the relief awarded on the contract claim or claims* with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made *only upon final resolution of the contract claims* and *only by ‘a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.’*” (*Id.* at p. 876, italics added.)

Our Supreme Court reaffirmed that holding in *DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, where it upheld a trial court’s denial of attorney fees to a company that prevailed on enforcement of a forum selection clause while litigation continued in Florida. The court explained: “Because none of [the breach of contract and related] claims had yet been resolved and the litigation was still ongoing in Florida, the California trial court was in no position to ‘compare the relief awarded on the contract claim or claims with the parties’ demands on those same claims and their litigation objectives’; that comparison could be made only ‘upon final resolution of the contract claims.’” (*Id.* at p. 974, quoting *Hsu, supra*, 9 Cal.4th at p. 876.) Applying those principles here, because the trial court had not determined the Wesners’ entitlement to

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<sup>2</sup> We do agree with the statement in *P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1052, however, that a noticed motion for contractual attorney fees “may be filed after the judgment has already been entered [citation]—and almost always is, for good reasons.” Certainly, had the trial court decided the motion for attorney fees in this case after its award of rescissory damages and after entry of judgment thereon, we would not be considering this issue on appeal.

rescissionary damages or their amount when it ruled on the County's attorney fee motion, it was manifestly unable to consider the relief granted to the Wesners when comparing the relief awarded on the contract claims with the parties' litigation objectives and demands.

We recognize that the trial court's order on the County's motion for attorney fees suggested an award of rescissionary damages might be forthcoming. We do not agree with the County, however, that the trial court's order "expressly addressed the issue of rescissionary damages vis-à-vis a determination of the prevailing party" as the County argues in its respondent's brief. The order on the attorney fee motion stated only that the court would not allocate attorney fees based on Civil Code section 1692 and would entertain a defense motion on moving costs at a future date if such a motion were filed. Though the trial court alluded to a future determination of rescissionary damages, it had not even seen a motion, let alone received evidence on the subject when it ruled on the County's fee motion. Accordingly, it was impossible for the court, in making its prevailing party determination, to weigh the relief awarded to each party on the contract causes of action as it was required to do. It is undisputed the trial court subsequently awarded rescissionary damages to the Wesners, so the trial court's attorney fee order necessarily failed to take those damages into account.

The cases relied upon by the County are of no assistance to its argument. In *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1086, the party moving for attorney fees filed its motion before entry of judgment, but the trial court decided it after entry of judgment. Similarly, *Walsh v. New West Federal Savings & Loan Assn.* (1991) 234 Cal.App.3d 1539, 1547–1548, rejected the defendant's argument that an attorney fee motion was " 'premature' because a final decision had not yet been 'rendered *on appeal*.' " (*Italics added.*) Neither case addressed a situation like this one, where the trial court determined prevailing party status before it fully resolved the parties' contract claims.

Interestingly, the County's own respondent's brief aptly frames the problem in this case, stating: "The County won the issue of rescission and received a possessory interest

in Conn Creek Road. As a result of the trial court[']s disposition of the contract claims, Wesner was awarded restitution damages. Judge Ortiz had the discretion to weigh these competing facts to determine that the County prevailed.” The County is correct that the trial court had the discretion to weigh those competing facts—the problem is it could not do so because it decided the attorney fee motion *before* the award of rescissory damages had been made. Accordingly, we must remand to allow the trial court to determine the prevailing party under Civil Code section 1717 based on the final resolution of the contract claims.<sup>3</sup> We express no opinion on how the trial court should exercise its discretion.

Because we reverse for the reasons discussed above, we need not reach the Wesners’ arguments that fees could not be awarded because the contract was illegal and that the trial court abused its discretion in finding the County to be the prevailing party.

### **III. DISPOSITION**

The judgment is reversed solely as to the award of attorney fees. On remand, the trial court shall enter a modified judgment striking paragraph (6) awarding the County attorney fees and costs in the total amount of \$128,965.37 and paragraph (8) ordering an offset resulting in a net recovery to the County of \$108,935.37. This disposition is without prejudice to the County filing a motion for attorney fees following entry of judgment on remand. The Wesners are entitled to costs on this appeal.

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<sup>3</sup> It may also be appropriate for the court to consider whether any reduction in fees should be made to reflect the parties’ respective degrees of success, or to apportion fees. We take no position as to whether such adjustments would be appropriate.

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Margulies, Acting P. J.

We concur:

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Banke, J.

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Sanchez, J.

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